No. 2413

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

EDWIN F. MEYER and
EMAR GOLDBERG,

Plaintiffs in Error,

vs.

THE UNITED STATES OF AMERICA,

Defendant in Error.

Petition for Rehearing

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Filed this.....day of March, A. D., 1915

FRANK D. MONCKTON, Clerk.

By.....Deputy Clerk.

THE TEN BOSCH COMPANY, SAN FRANCISCO

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PETITION FOR REHEARING

To the HONORABLE THE JUSTICES OF THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE NINTH CIRCUIT:

The petitioner respectfully requests a rehearing of the above-entitled action.

It is respectfully urged that the Court has failed to pass upon the point raised that the lower Court

committed prejudicial error in admitting as evidence of unreasonable profits, various sales of other kinds and descriptions of zinc to other purchasers.

With respect to this point, this Court says:

> "This was an attempt to prove values by the market, which is always admissible. Zinc was being sold on the market in and around Seattle and elsewhere, constantly, and the sole purpose of the testimony was to show what that market value was. We find no error in the ruling of the Court."

The difficulty is, the Court has failed to appreciate the fact that to prove this market value, the Government offered in evidence *sales of zinc of various kinds and descriptions, substantially varying from the kinds and sizes of zinc sold to the Government in the transaction in question.*

In our reply brief, at page 21, we were careful to compile an analysis of Mr. House's testimony, showing the dates, amounts, prices, descriptions and purchases of various zincs sold by the Corder Company or the Great Western Smelting and Refining Company, or other sellers, and showing these sales did not take place under the conditions or under the circumstances as the sale of the zinc in question.

We again invite the Court's attention to this table appearing on page 22 of our reply brief.

We shall not here repeat the cases in support of the proposition that evidence of values is inadmissible, unless the sales are of similar articles, under similar conditions and under similar circumstances.

It is submitted in this behalf that the Court in its opinion erred in deciding that in a criminal action, involving the liberty of the defendant, market values could be established by showing transactions preceding the transactions in controversy, where the record clearly shows not only entirely *dissimilar conditions,* but also where the record shows that the transactions were in goods of a *different quality and quantity.* It is not urged that the testimony introduced was improperly offered. It is admitted that if such testimony is not incompetent, irrelevant and immaterial, then it was properly proven,—that is to say, no point is made as to the manner of the proof. The Court's attention is solely directed to the evidence itself.

The indictment charged with respect to sales of zinc, that the object of the conspiracy was that the "United States should purchase zinc rolled sheets and boiler plates at a price greatly in excess of its real value, and the conspirators should obtain unreasonable profits," etc. In support of this contention, the Government offered in evidence sales of various zincs of VARIOUS KINDS AND DESCRIPTIONS, VARYING ENTIRELY FROM THE KINDS AND SIZES OF ZINC SOLD TO THE GOVERNMENT, in the transaction in question.

It further appeared from the evidence that supplies to the Navy Yard had to be shipped in a peculiar manner, and that great speed was necessary in obtaining this zinc. It is further shown that

there was no zinc of the kind or character on the Pacific Coast at the time, and that the great fleet of the United States was about to arrive at Seattle and would require great quantities of zinc. Not only did the Government fail to establish or prove that the market prices introduced in evidence, were established under conditions similar to the sale of zinc alleged in the indictment, but the defendants proved that said sales took place under totally dissimilar conditions, and under entirely different circumstances, and were of entirely different articles.

It is to be observed that in all the cases permitting the proof of value by the market alone, this proof is permitted under conditions that are reasonably similar, and of goods of the same kind and character.

But it is further contended here that the transactions not only occurred under dissimilar circumstances, but that the articles in the transactions were totally dissimilar in kind and character. The table hereinbefore referred to clearly shows that the market price of zincs of an entirely different kind and character were introduced in evidence tending to establish the market value of the zinc in controversy. This can hardly be said to come within the purview of the rule announced by this Court allowing proof of market value by other transactions of a similar character.

We again invite the Court's attention to the case of *Schradsky* v. *Stimson,* 76 Fed. 730:

"Touching this latter ruling it is only necessary to say that the opinion expressed by the witness concerning the reasonable rental value of the premises occupied by the defendant was based on the fact that they were located in a sightly building, at the junction of two streets (Fifteenth and Larimer), on both of which streets there were street-car lines; also, on the further facts that the building fronted on both streets, and was provided with steam heat, and was for these reasons a very eligible business location. No evidence was elicited from the witness, or attempted to be elicited, that the rent that had been charged for stores Nos. 1445, 1449 and 1451, on Larimer street, was a reasonable rental, or that the building in which the stores were located, and the surroundings thereof, were of such character as to render it probable that the rent charged and collected for such stores was a fair criterion by which to determine the reasonable rental value of the premises in controversy. IT IS A WELL KNOWN FACT THAT MANY CIRCUMSTANCES MAY, AND OFTEN DO, AFFECT THE RENTAL VALUE OF BUILDINGS LOCATED IN LARGE CITIES, AND THAT IT FREQUENTLY HAPPENS THAT PREMISES OF THE SAME SIZE COMMAND A DIFFERENT RENTAL, ALTHOUGH THEY ARE LOCATED IN THE SAME NEIGHBORHOOD AND FRONT ON THE SAME STREET. WE THINK, THEREFORE, THAT THE TESTIMONY SOUGHT TO BE ELICITED FROM THIS WITNESS BY THE AFORESAID QUESTION WAS PROPERLY EXCLUDED. IT HAS NO NECESSARY TENDENCY TO ESTABLISH THE REASONABLE REN-

TAL VALUE OF THE PREMISES IN CONTROVERSY, AND MIGHT HAVE BEEN VERY MISLEADING, UNLESS FURTHER EVIDENCE WAS PRODUCED, WHICH WAS NOT OFFERED, SHOWING THAT THE SITUATION OF THE RESPECTIVE PROPERTIES WAS SUCH THAT THE RENT PAID FOR ONE WAS A FAIR RENTAL FOR THE OTHER. MOREOVER, THE TESTIMONY WAS OBJECTIONABLE ON THE FURTHER GROUND THAT IT HAD A MARKED TENDENCY TO BURDEN THE CASE WITH COLLATERAL ISSUES; FOR, BEYOND ALL QUESTION, IF IT HAD BEEN ADMITTED, THE PLAINTIFF WOULD HAVE BEEN ENTITLED TO SHOW WHAT WAS THE REASONABLE RENTAL VALUE OF THE PROPERTY REFERRED TO BY THE WITNESS, BETWEEN WHICH AND THE PROPERTY IN CONTROVERSY IT WAS PROPOSED TO INSTITUTE A COMPARISON."

In the case of *In re Thompson,* 28 N. E. 390, before the Court of Appeals of New York, Justice Parker, delivering the opinion of the Court, said:

"BUT A PARTY MAY NOT ESTABLISH THE VALUE OF HIS LAND BY SHOWING WHAT WAS PAID FOR ANOTHER PARCEL SIMILARLY SITUATED, BECAUSE IT OPERATES TO GIVE TO THE AGREEMENT OF THE GRANTOR AND GRANTEE THE EFFECT OF EVIDENCE BY THEM THAT THE CONSIDERATION FOR THE CONVEYANCE WAS THE MARKET VALUE, WITHOUT GIVING TO THE

OPPOSITE PARTY THE BENEFIT OF CROSS-EXAMINATION TO SHOW THAT ONE OR BOTH WERE MISTAKEN. IF SOME EVIDENCE OF VALUE, THEN *PRIMA FACIE* A CASE MAY BE MADE OUT, SO FAR AS THE QUESTION OF DAMAGES IS CONCERNED, BY PROOF OF A SINGLE SALE, AND THUS THE AGREEMENT OF THE PARTIES WHICH MAY HAVE BEEN THE RESULT OF NECESSITY OR CAPRICE WOULD BE EVIDENCE OF THE MARKET VALUE OF LAND SIMILARLY SITUATED, AND BECOME A STANDARD BY WHICH TO MEASURE THE VALUE OF LAND IN CONTROVERSY. THIS WOULD LEAD TO AN ATTEMPT BY THE OPPOSING PARTY TO SHOW,—FIRST, THE DISSIMILARITY OF THE TWO PARCELS OF LAND; AND, SECOND, THE CIRCUMSTANCES SURROUNDING THE PARTIES WHICH INDUCED THE CONVEYANCE,—SUCH AS A SALE BY ONE IN DANGER OF INSOLVENCY, IN ORDER TO REALIZE MONEY TO SUPPORT HIS BUSINESS, OR A SALE IN ANY OTHER EMERGENCY WHICH FORBIDS A GRANTOR TO WAIT A REASONABLE TIME FOR THE PUBLIC TO BE INFORMED OF THE FACT THAT HIS PROPERTY IS IN THE MARKET; OR, ON THE OTHER HAND, THAT THE PRICE PAID WAS EXCESSIVE, AND OCCASIONED BY THE FACT THAT THE GRANTEE WAS NOT A RESIDENT OF THE LOCALITY, NOR ACQUAINTED WITH REAL VALUES, AND WAS THUS READILY INDUCED TO PAY A SUM FAR

EXCEEDING THE MARKET VALUE. Thus each transaction in real estate claimed to be similarly situated might present two side issues, which could be made the subject of as vigorous contention as the main issue, and, if the transactions were numerous, it would result in unduly prolonging the trial, and unnecessarily confusing the issues, with the added disadvantage of rendering preparation for trial difficult.

"Our attention has been called to a case in this court where the question has been passed upon in the manner here presented, but there are a number of decisions indicating the tendency of the court to be against proving value by evidence of the selling price of similar property. In *Huntington* v. *Attrill,* 118 N. Y., 365, 23 N. E. Rep. 544, the defendants attempted to prove the value of certain seaside property by showing the value of other property of the same general character situated in different places, and Judge Bradley, speaking for the court, said: 'It may be that such evidence would have furnished some guide for estimate of the value of the property, but might not. Such evidence would present collateral issues, which might, and very likely would, involve a variety of considerations having relation to similarity or difference, and to advantages and disadvantages of the different properties in numerous respects, as compared with that in question. It is quite well settled that evidence of that character is not admissible upon the question of the value of property in controversy.' The question was not necessarily before the court in *Mayor, etc.,* v. *McCarthy,* 102 N. Y. 630-638, 8 N. E. Rep. 85; but Chief Justice Ruger, referring to the question whether the

price paid on sales of real estate between individuals is admissible as evidence of value, said: 'We think it quite clear, however, that such price is not, in any view, competent evidence of value.' In *Blanchard* v. *Steam-Boat Co.,* 59 N. Y. 292, the defendant attempted to show the value of a sunken steam-boat by proving the value of other steam-boats with which she could be compared, and it was held that the evidence was not competent. In *Langdon* v. *City of New York,* (Sup. Ct.) 13 N. Y. Supp. 864, the objection was that other evidence should be produced to establish the fact sought to be proven (page 866) so that the question of the relevancy of the evidence was not before the court. We are of the opinion that the value of property which depends upon the presence or absence of inherent qualities not necessarily present or absent in other and similar property cannot be proved by showing the price paid for such other and similar property. The value of property having a recognized market value, such as No. 1 wheat and corn, may, of course, be proven by showing the market prices; BUT THE VALUE OF PROPERTY WHICH IS DEPENDENT UPON LOCALITY, ADAPTABILITY FOR A PARTICULAR USE, AS WELL AS THE USE MADE OF PROPERTY IMMEDIATELY ADJOINING, MAY NOT BE SHOWN BY THE EVIDENCE OF THE PRICE PAID FOR SIMILAR PROPERTY. Even under the Massachusetts rule, a reversal would not be justified because of the extent of the discretion vested in the judge or officer presiding at the trial to determine whether such evidence is admissible, depending, of course, on various elements, such as the nearness or remoteness of the time of sale; whether the premises are far sep-

> arated; the condition of the property about the parcel sold, and the use made of it, which may have operated to enhance or diminish its selling value; the similarity of the property not only as to description, but as to its availability for use. *Chandler* v. *Jamaica Pond Aqueduct Corp.,* 122 Mass. 305; *Gardner* v. *Brookline,* 127 Mass. 358-363, and cases cited."

In considering the application of the Statute of Limitations to the Overt Acts set forth in the indictment, the Court said:

> "Our firm conviction is that public funds are not appropriated or converted while there is opportunity on the part of the Government to prevent such appropriation, and in this case it was still within the power of the Government to stop payment of this check, at least until credit was given for it by the bank of deposit of public funds against which Orr was authorized to check, or it was paid by the National Treasury."

No issue is taken by plaintiff in error with the Court as to the rules of law applicable to the questions at issue. Issue is solely taken as to the application of these rules to the facts. The Court in its opinion seems to indicate the mere fact that the government could have at any time stopped the payment of the check, is sufficient to remove the bar of the Statute of Limitations.

Without going into a detailed analysis of the indictment (see plaintiff in error's opening brief), we invite the Court's attention to the fact that in coming to a conclusion as to what was the last ultimate Overt

Act, the entire indictment must be taken into consideration. It must be construed in its entirety and scrutinized in all its allegations, so that in view of the objects of the conspiracy it may judge what the Overt Acts necessary to effectuate the object of the conspiracy really are. Without further analysis, it would seem to the plaintiffs in error that the ultimate object of the conspiracy was the defrauding of the government and the obtaining of the check. As to the obtaining of the check, there can be no doubt but that any Overt Act to effectuate this object was barred by the Statutes of Limitations, so the sole remaining question is as to when the government was defrauded. The mere fact and this is the point we desire to particularly emphasize, that the government having been once defrauded the result thereof continuing on forever does not constitute an Overt Act. The Court has looked in its opinion merely to the physical aspects of the transactions wherein a debt is paid by a check. A man may pay a merchant a debt due him by a check and that check may pass through forty hands, yet would this Court hold that if this check had been obtained by the merchant under false pretences there would be no defrauding by the merchant the moment the check had been obtained from the debtor although the withdrawal of the funds from the account of the debtor in the bank did not take place till many days subsequent. The mere fact that the government might have a defense to the payment of this check does not in itself mean that the government was not defrauded at the moment

the check was given. The moment the government was defrauded the conspiracy was consummated and it is contended that the moment the check was delivered as a good and valid obligation of the government, the government was defrauded and the government having been defrauded at this moment the object of the conspiracy was ended and all subsequent steps of any kind and character were merely the results of a pre-existing conspiracy.

The charge against the defendant, Emar Goldberg, is, to our minds, absolutely without foundation, and shown to be such. What purpose could Emar Goldberg, an employee, under a salary, have had in entering into the conspiracy referred to in the indictment? He could not have been the gainer thereby. He had no interest in the profits of the Great Western Smelting and Refining Company; he was a mere employee. That he was the victim of a black-mailing scheme is absolutely plain. The business of his employer was threatened with extermination by Kettlewell unless he allowed Kettlewell money. He complained to Mr. James A. Kerr, a prominent member of the Seattle bar, of Kettlewell's importunities.

Kettlewell himself, admitted his own infamy, and that he had a scheme to compete with honest merchants in their business relations with the Government. He sold goods to the Government under various fictitious names, and made large profits thereby. It was with this kind of a man that Goldberg (the employee) was thrown in contact. This man Kettlewell, was put in a responsible position by the

Governmental authorities, and he used this position as a club.

It is respectfully submitted that a rehearing should be granted in this case.

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